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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939. No. 229.

THE REAL ESTATE-LAND TITLE AND TRUST COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF ON BEHALF OF PETITIONER SUR WRIT OF CERTIORARI GRANTED OCTOBER 9, 1939.

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OPINIONS OF THE COURTS BELOW.

The Opinion of the Circuit Court of Appeals is reported in 102 Fed. (2d) 582. It will be found on pages 319-327 of the Record. The Findings of Fact, Conclusions of Law, and the Opinion of the Trial Judge in the District Court will be found on pages 287 to 306 inclusive of the Record.

JURISDICTION.

1. The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938, Title 28 U. S. C. A. Section 347.

2. The judgment of the Circuit Court of Appeals was entered on March 13, 1939 (R. 327). Petition for rehearing was filed April 11, 1939, within the time provided by the Rules of the Circuit Court of Appeals for the Third Circuit, and the petition for rehearing was denied on May 1, 1939 (R. 328).

On July 26, 1939, taxpayer filed with your Honorable Court a petition for writ of *certiorari* to the United States Circuit Court of Appeals for the Third Circuit, which petition was granted by your Honorable Court on October 9, 1939.

STATEMENT OF QUESTIONS PRESENTED.

1. Whether or not taxpayer is entitled to a deduction for obsolescence of a title plant in determining net income subject to Federal income tax for the fiscal year ending October 31, 1928.

2. Whether or not it was proper for the Circuit Court of Appeals in this case to direct the entry of a judgment contrary to the Findings of Fact and Conclusions of Law of the learned Trial Judge.

3. Whether under the claim for refund filed in this case taxpayer is entitled to a deduction on account of the abandonment of a title plant in determining net income subject to Federal income tax for the fiscal year ending October 31, 1928.

STATUTES INVOLVED.

The relevant provisions of the Revenue Act of 1928 (45 Stat. 795) are set forth in the Appendix hereto at pages 49 to 51 inclusive.

STATEMENT OF THE CASE.

The taxpayer herein is a corporation created by the merger of three other corporations, namely, the Real Estate Title Insurance and Trust Company, the Land Title and Trust Company, and the West End Trust Company, all of which formerly carried on business in the City of Philadelphia (R. 245). The merger of these three companies became effective October 31, 1927, and the new corporation opened for business the following day (R. 245). Negotiations for the said merger were first entered into by the Real Estate Title Insurance and Trust Company and the West End Trust Company, which companies agreed on a two-company merger. The Land Title and Trust Company was not considered as a party to the merger until the latter part of September, 1927, about two weeks before the merger agreement was signed (R. 30, 31).

Before the above-mentioned merger two of the companies, viz., the Real Estate Title Insurance and Trust Company, and the Land Title and Trust Company, each owned a title plant used in its respective business of insuring titles to real estate. Both of these title plants were acquired by taxpayer at the time of the merger (R. 31). When the merger agreement was signed there was no definite plan for the use or disposition of the two title plants (R. 32). The Land Title and Trust Company came into the merger negotiations at such a late date that there was not time to give much consideration to the practical operation of the two plants, or to what disposition should be made of either or both of them (R. 32). It was the idea of the President of the new company that the plant of the Land Title and Trust Company should be used by the new company in carrying on its title business (R. 32). It was not until the negotiations for the merger had been completed, and the agreement signed by all three companies, that the question arose as to what would be done with the two title plants (R. 32).

An officer of The Land Title and Trust Company and an officer of the Real Estate Title Insurance and Trust Company were appointed to examine into the situation (R. 31). After their report was submitted it was decided that the new corporation (taxpayer herein) should commence operations using the title plant of the Real Estate Title Insurance and Trust Company, and that the title plant of the Land Title and Trust Company should be stored and held in reserve (R. 32 and 296). It was not considered economical to keep both title plants up-to-date by daily additions thereto, until it was determined that both title plants would be needed in the business of the new corporation (R. 32, 33).

The title plant of the Land Title and Trust Company was used in connection with Sheriff's sales occurring the first Monday of November, 1927, and other information was obtained from this plant and used by the taxpayer for several weeks thereafter (R. 32-34). Within a couple of months after the merger it was definitely determined that the title plant formerly owned by the Real Estate Title Insurance and Trust Company would be sufficient for the purposes of taxpayer's business, and at that time there was a virtual abandonment of the title plant formerly owned by the Land Title and Trust Company (R. 32, 33).

The abandoned plant was in the market for sale and would have been sold had a reasonable offer been received. A price of $1,000,000 was quoted on it, but no offer in any amount was received (R. 33). No additions were made to this plant at any time after the merger, and as time went on the plant became more and more out of date due to the fact that it was not being kept up by daily additions thereto. During the first year after the merger it would have been necessary to enter in the records of this title plant, a record or notation of 227,498 documents to keep it up-to-date (R. 105). The dismantled

title plant was stored in the basement of premises 517 Chestnut Street, where it was still housed at the time of the trial of this case (R. 32 and 34).

Taxpayer brought suit against the United States in the District Court of the United States for the Eastern District of Pennsylvania, wherein taxpayer claimed that in determining its net income subject to tax for the fiscal year ending October 31, 1928, it was entitled to a deduction in the amount of $1,250,000 due to the fact that the title insurance plant then owned by taxpayer, but formerly owned by the Land Title and Trust Company, became obsolete and was abandoned during the said year, and claimed a refund of income tax for the said year in the amount of $153,125. This suit was started after taxpayer's claim for refund had been disallowed by the Commissioner of Internal Revenue. The case was tried in the District Court on February 2nd and 3rd, 1937, by a Judge without a jury.

Taxpayer produced testimony at the trial showing that the title plant formerly owned by The Land Title and Trust Company was not worth over $125,000 on October 31, 1928, a year after the merger, and that it had been worth a minimum of $1,000,000 on March 1, 1913 (R. 75, 76, 102, 297). No depreciation or obsolescence had ever been allowed upon the said title plant from March 1, 1913 up to the date of the merger (R. 247).

The Trial Judge found that this title plant was the subject of obsolescence during taxpayer's fiscal year ending October 31, 1928, that it became obsolete on or before October 31, 1928, that taxpayer had sustained a loss during its fiscal year commencing November 1, 1927 and ending October 31, 1928 in the amount of $875,000 representing the difference between the fair market value of this title plant on March 1, 1913, and its value on October 31, 1928 (R. 297, 298), and concluded that the taxpayer was entitled to deduct this amount in determining its net taxable income for the fiscal year ending October 31, 1928 (R. 301).

Judgment was entered in the District Court in favor of taxpayer and against the United States on March 31, 1937, in the amount of $107,270.71 with interest, representing the amount of the overpayment of income tax by taxpayer for the year in question, and from this judgment the United States appealed to the Circuit Court of Appeals for the Third Circuit (R. 306 and 307).

The case was argued in the Circuit Court of Appeals on January 11, 1938, before Hon. J. Warren Davis and Hon. John Biggs, Jr., Circuit Judges, and Hon. Albert L. Watson, District Judge, and fourteen months later, to wit, on March 13, 1939, an opinion was filed by the Hon. John Biggs, Jr., reversing the judgment of the District Court. On the 11th day of April, 1939, a petition for rehearing was filed in the Circuit Court of Appeals, which petition was denied on May 1, 1939.

On July 26, 1939, taxpayer filed with your Honorable Court a petition for writ of *certiorari* to the United States Circuit Court of Appeals for the Third Circuit, which petition was granted on October 9, 1939.

SPECIFICATION OF ERRORS TO BE URGED.

1. The Circuit Court of Appeals erred in holding that the title plant of the Land Title and Trust Company could be operated effectively with approximately one-third the number of employees required to operate the plant formerly owned by the Real Estate Title Insurance and Trust Company.

2. The Circuit Court of Appeals erred in holding that there is no evidence to show that the title plant of the Land Title and Trust Company was used in connection with new searches of properties after October 31, 1927.

3. The Circuit Court of Appeals erred in holding that "the basis offered for obsolescence is really that of the duplication of property."

4. The Circuit Court of Appeals erred in holding that the loss claimed by the taxpayer cannot be brought within any established definition of obsolescence.

5. The Circuit Court of Appeals erred in holding that it is contrary to the facts to hold that the title plant formerly owned by the Land Title and Trust Company became obsolete within the taxable year.

6. The Circuit Court of Appeals erred in disregarding the findings of the District Court and in holding that it is contrary to reason to conclude that a title plant created between the years 1886 and 1887 and steadily added to and kept up-to-date until October 1927, loses its usefulness in the following twelve months because of the failure to add current notations to its records, and that there is no adequate evidence of record in the case at bar to sustain such a view.

7. The Circuit Court of Appeals erred in holding that the deterioration suffered by the title plant in the period from November 1, 1927 to October 31, 1928, was physical deterioration and as such may not be claimed as obsolescence within the definition set forth in United States Cartridge Company *v.* United States, 284 U. S. 511.

8. The Circuit Court of Appeals erred in holding that obsolescence cannot be maintained upon the basis claimed in the case at bar.

9. The Circuit Court of Appeals erred in holding that the taxpayer is not entitled to the deduction claimed in this proceeding on the theory of abandonment because the claim for refund by taxpayer "was asserted by it solely upon the ground of obsolescence."

10. The Circuit Court of Appeals erred in holding that the amount of deduction allowed to the taxpayer by the District Court was not supported by the evidence.

11. The Circuit Court of Appeals erred in reversing the judgment of the District Court.

12. The Circuit Court of Appeals erred in directing the entry of a judgment for the respondent.

13. The Circuit Court of Appeals erred in entering the following judgment:

> "The judgment of the court below is reversed and the cause is remanded with the direction to enter judgment in favor of the defendant-appellant."

SUMMARY OF ARGUMENT.

We shall discuss the legal questions involved in this case under the following headings:

1. Taxpayer is entitled to a deduction for the fiscal year ending October 31, 1928 in the amount of the loss sustained by it due to the obsolescence and abandonment of the title plant formerly owned by the Land Title and Trust Company.

2. The loss sustained by taxpayer through obsolescence and abandonment of the title plant formerly owned by the Land Title and Trust Company is the difference between the fair market value of the said title plant on March 1, 1913, and the value thereof on October 31, 1928.

3. There is ample evidence to sustain the Findings of Fact of the Trial Judge.

4. The Circuit Court of Appeals erred in directing the entry of a judgment contrary to the Findings of Fact and Conclusions of Law of the Trial Judge, in that his Findings of Fact are conclusive and fully sustain his Conclusions of Law.

5. On the record in this case taxpayer is clearly entitled to a deduction on the theory of abandonment as well as on the theory of obsolescence.

ARGUMENT.

1. Taxpayer is entitled to a deduction for the fiscal year ending October 31, 1928 in the amount of the loss sustained by it due to the obsolescence and abandonment of the title plant formerly owned by the Land Title and Trust Company.

There is no doubt that the taxpayer in this case has sustained a real loss. Upon the formation of the merged company under the name of The Real Estate-Land Title and Trust Company, it found itself with two complete title plants, one formerly operated by the Real Estate Title Insurance and Trust Company, and the other by the Land Title and Trust Company. It was not known at the time the merger agreement was entered into what disposition would be made of these plants (R. 32). As pointed out by Mr. J. Willison Smith, President of the corporation, in his testimony, the merger had first been agreed upon by the West End Trust Company and the Real Estate Title Insurance and Trust Company (R. 30, 31). The West End Trust Company had no title plant so the merger as originally planned included but one such plant (R. 31). When the Land Title and Trust Company came into the picture about two weeks before the merger agreement was signed, an entirely new situation was presented. It was then for the first time that the two title plants came upon the scene together. Mr. Smith testified that there was not time to give this matter any serious consideration before the agreement was signed.

After the negotiations had been completed and the agreement signed by the Directors of all three Companies, the question naturally arose as to what would be done with the two title plants. Mr. Smith testified that the matter was referred to Mr. Bonsall, then Vice President of the Land Title and Trust Company, under whose supervision the Title Department operated, and Mr. Cowdrick, then Vice President of the Real Estate Title Insurance

and Trust Company, who had supervision of the title work of that organization. Mr. Mecutchen, Title Officer of the taxpayer, was at that time in the Title Department of the Land Title and Trust Company under Mr. Bonsall. He testified that he had gone with Mr. Bonsall and Mr. Cowdrick to examine the plant of the Real Estate Title Insurance and Trust Company and that they had arrived at the conclusion that they would commence operations with the title plant of that company (R. 50). This was after the merger agreement was entered into and only shortly before the merger became effective. The reason for the decision to continue the use of the title plant of the Real Estate Title Insurance and Trust Company instead of the Land Title and Trust Company was that the operation of the former required only 43 employees while the operation of the latter required 124 (R. 51).

It is to be noted that at the time the merger agreement was entered into and thereafter until the examination of the plant of the Real Estate Title Insurance and Trust Company by Mr. Bonsall, Mr. Mecutchen and Mr. Cowdrick, there was no plan for, nor had the officers of the new corporation given serious consideration to, the disposition of the two title plants (R. 32). Mr. Smith testified that he originally thought the Land Title and Trust Company plant the better of the two and that this one would be used, but that he had in mind they might be able to work them advantageously together. It is clear that the plant of the Land Title and Trust Company was not acquired by the new corporation with the intent of eliminating competition. We emphasize this particularly.

When it was later ascertained that the two plants would not be necessary and that the Real Estate Title Insurance and Trust Company plant could do the work alone and be operated more economically than the Land Title and Trust Company plant, the logical conclusion was to abandon the

latter. Needless to say it would have been bad business to incur the expense of keeping both plants up to date. The Land Title and Trust Company plant had been taken down and stored the latter part of October and early part of November, 1927, in the basement of premises No. 517 Chestnut Street (R. 32). It was still there in reserve, so to speak, and could have been taken out and used in conjunction with or in lieu of the Real Estate Title Insurance and Trust Company plant if it appeared advantageous to do so.

Mr. Smith testified that some time after the merged corporation had started using the plant of the Real Estate Title Insurance and Trust Company in its operations it was definitely determined that it would be satisfactory and that there would be no further need for the old Land Title and Trust Company plant (R. 32). At that time there became a virtual abandonment of the Land Title and Trust Company plant so far as its use by the new corporation was concerned. It was then in the market for sale and Mr. Smith testified that it would have been sold had a reasonable offer been received. He discussed its possible sale with Mr. Barker, then President of the Bankers Trust Company, and quoted a price of $1,000,000 (R. 33). Negotiations were carried on with regard to this sale but eventually were abandoned by Mr. Barker without his having made any offer. Mr. Smith was asked if anyone had made him an offer for the purchase of the plant in any amount and he replied in the negative (R. 33). Of course the plant was running down all this time. During the first year after the merger 227,498 documents should have been entered in the records of the plant to keep it up to date (R. 105). As was testified by Mr. Mecutchen, no entries whatever were made (R. 105). It is clear from this that obsolescence set in after the plant was stored in the basement at No. 517 Chestnut Street and the plant was deteriorating in value during the

entire year. On October 31, 1928, which was the end of taxpayer's fiscal year, the expense of putting this plant in shape for use would have been practically prohibitive (R. 78).

The Revenue Act of 1928, which applies to this case, provides in Section 23 for "Deductions from Gross Income," including in paragraph (*f*) "losses sustained during the taxable year and not compensated for by insurance or otherwise" and in paragraph (*k*) "a reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence." The taxpayer's loss can be properly placed in either one of these classes. It certainly was "sustained during the taxable year and not compensated for by insurance or otherwise" and it was equally due to "obsolescence" of the title plant of the Land Title and Trust Company.

That the plaintiff suffered a "loss" in the sense that the word is used in the Revenue Act of 1928 is clearly apparent from the decision of the Board of Tax Appeals in the case of *Fox River Paper Co.* v. *Commissioner of Internal Revenue,* 28 U. S. Board of Tax Appeals Reports 1184 (1933). There were two questions in that case dependent upon different sets of facts. One part of the case is almost identical with the case at bar. The petitioner purchased machinery and equipment, and in the same year as the purchase found that it was unsuitable for its purposes and accordingly abandoned it and claimed credit for the cost price in determining its net income for tax purposes. The Board of Tax Appeals there held that this constituted an abandonment which came within the terms of an identical provision of the Revenue Act of 1918, saying at page 1200:

> "The Board has held, in *Reuben H. Donnelley Corp.*, 26 B.T.A. 107; *I. G. Zumwalt,* 25 B.T.A. 566; *Belridge Oil Co.,* 11 B.T.A. 127, that whether or not

there has been an abandonment depends on the intention of the owner, coupled with the act of abandonment, both to be ascertained and determined from all the facts and surrounding circumstances.

All of the property was purchased by the petitioner with the intention of using it in the operation of its business, with certain changes to make it suitable for the manufacture of paper from rags. After the execution of the agreement in 1920, the petitioner discovered that certain of the machinery and equipment was not in condition for its use and not suited for its purpose.

* * * * * * *

"It is our conclusion that the petitioner did sustain a loss in the amount of $103,524.92 in 1920 and that such loss is deductible under section 234 (a) (4) of the Revenue Act of 1918. *Parma Co.*, 18 B.T.A. 429; *Winter Garden, Inc.*, 10 B.T.A. 71; *Peoples Ice & Cold Storage Co.*, 10 B.T.A. 16; *Union Bed & Spring Co.* v. *Commissioner*, 39 Fed. (2d) 383; *Wheeling Tile Co.* v. *Commissioner*, 25 Fed. (2d) 455."

A comparatively recent case very much in point is *Sanitary Co. of America* v. *Commissioner of Internal Revenue*, 34 Fed. (2nd) 439, (C. C. A. 3rd, 1929), in which the opinion was written by his Honor, Judge Buffington, who held that a loss was properly taken even though it had been incurred by buying the plant of a competitor and scrapping it to prevent competition. He there said (page 440):

"What followed was quite in the line of ordinary business. The Sanitary Company scrapped the plant, and incurred the loss which almost inevitably follows when a going plant is scrapped. It sold at the scrap prices of the inventory $15,876.57, and removed to other plants such articles, to the amount of $21,104.48,

> as it could use, and, after deducting freight and other expenses, placed its loss at $10,699.54. We find this course, carried out on the principles and practices usually incident to business, was a just and proper mode of ascertaining its loss. The refusal of the taxing authorities to allow for this loss was in our judgment reversible error. In arriving at such conclusion we note the case of Sample *v.* Commissioner (C. C. A.) 23 F. (2d) 671, is in accord therewith."

From the evidence in the case at bar it is clear that the title plant formerly owned by the Land Title and Trust Company was not kept up-to-date by daily additions thereto after October 31, 1927, the last day of the taxable year preceding the taxable year involved in this case. Judge Biggs, of the Circuit Court of Appeals, in his opinion states:

> "Moreover, we think that in a true sense the deterioration suffered by the plant in the period from November 1, 1927, to October 31, 1928, was physical deterioration, and as such may not be claimed as obsolescence within the definition set forth in United States Cartridge Co. *v.* United States, *supra*. The loss suffered by the appellee within the taxable year is more closely allied to depreciation, which, continued from year to year thereafter, might result upon some future date in a complete loss of value in the plant" (R. 325).

From the above holding it is clear that Judge Biggs was of the opinion that deterioration was suffered by the title plant during the period November 1, 1927 to October 31, 1928, but that such deterioration may not be claimed as obsolescence. Judge Biggs admitted that there was a loss suffered by the taxpayer within the taxable year, but said that this loss was "more closely allied to depreciation."

The taxpayer claimed a loss due to "obsolescence", and the Trial Judge found that the said title plant was the subject of "obsolescence" during the fiscal year ending October 31, 1928, and became "obsolete" on or before that date. It is submitted that Judge Biggs of the Circuit Court of Appeals, was in error in holding that this loss was "more closely allied to depreciation"; as depreciation results from ordinary wear and tear, while the loss in this case resulted *not* from ordinary wear and tear, but from the failure to keep the said title plant up-to-date by daily additions thereto, and from the abandonment thereof.

In the case of *Crooks, Collector,* v. *Kansas City Title and Trust Company,* 46 Fed. (2nd) 928 (C. C. A. 8th, 1931), it was held that abstract plants acquired by the taxpayer and not kept up-to-date because found upon trial to be inefficient, were the proper subjects of obsolescence.

In the opinion of Judge Kenyon in the *Crooks* case we find the following (page 929):

> "The real complaint of appellant is that notwithstanding complete obsolescence in 1930 was determined in 1920, under this record the amount to be set aside for such obsolescence is impossible of determination and that the court's allowance is wrong. As a jury was waived in writing we are limited to the questions as to whether there was substantial evidence to sustain the findings of fact and whether they support the judgment.
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> "The deduction under the law is a reasonable allowance for exhaustion, wear and tear of property used in the business, including a reasonable allowance for obsolescence. Revenue Act 1921, c. 136, sec. 234(a), 42 Stat. 227, 256."

"The Treasury Department through the Bureau of Internal Revenue has laid down the rule as to obsolescence of abstract plants under section 234(a), c. 136, 42 Stat. 227, 256, in a ruling as follows:

"'The cost of an abstract plant, found upon trial to be inefficient and to which additions were not made in order to keep it up-to-date, may be recovered through depreciation or obsolescence allowances.'

"The opinion as set forth in I. T. 1775 Internal Revenue Cumulative Bulletin is as follows:

"'In 1921 the taxpayer purchased the abstract plant of the M. Company. At the time this plant was purchased it was thought it could be used to advantage in the abstract and title guaranty work of the taxpayer but was found upon trial to be inefficient and the records in part a duplication of the records of the taxpayer. It was then decided not to continue additions thereto from day to day in order to keep it up-to-date.

"'Advice is requested as to whether the taxpayer may take as a deduction depreciation sustained to the plant in view of the fact that it has not been added to or kept up-to-date since its purchase.

"'Held, that it is a proper case for depreciation or obsolescence allowances and the cost of the plant less the salvage value thereof should be spread equally over the period from the date the permanent abandonment of the plant was foreseen to the date of the permanent abandonment and deductions allowed each year in such amounts for income tax purposes.'

. . . . . .

"There was substantial evidence to sustain the findings of fact by the court, and the conclusions of law are amply supported by such findings.

"The judgment is affirmed."

While in the *Crooks* case obsolescence was held to have extended over a period of years, this was due to the fact that obsolescence was foreseen in that case. In the case at bar, however, had there been no merger, there would have been no question of obsolescence, so it could not have been foreseen prior to that time. The point we emphasize is that in the *Crooks* case the court recognized that an abstract plant was a proper subject of obsolescence, and in doing so relied on a ruling by the Treasury Department.

The most common definition of the word "obsolete" is "out of use." There is no doubt of the fact that the title plant of the Land Title and Trust Company was definitely "out of use" on October 31, 1928. It had become obsolete for a number of different reasons including (1) discontinuance of posting, (2) storage in the basement of 517 Chestnut Street, and last, but not least, (3) its abandonment by the taxpayer.

Burnet v. *Niagara Falls Brewing Co., et al.*, 282 U. S. 648 (1931), was an appeal to the Supreme Court of the United States from the decision of the Circuit Court of Appeals for the Second Circuit allowing a claim for obsolescence of the property of a brewing company on account of the passage of the Prohibition Amendment. Mr. Justice Butler, in a very interesting opinion, went into the meaning of the word "obsolescence" in a case of this character and concluded that obsolescence had been reasonably established by the plaintiff. He emphasized the rule that "tax laws are to be liberally construed in favor of taxpayers" and cited a number of United States Supreme Court decisions to this effect. We quote the following from his opinion (p. 653):

"The Government argues that obsolescence is the state of becoming obsolete, that property is obsolete when it is no longer useful for the purpose for which it was acquired and can not be used for any other purpose and that obsolescence begins only when there is a reasonable certainty that the property will become obsolete. And further, that there is no finding that at any time during the taxable years in question it became apparent that the property would become obsolete and that no inference to that effect can properly be drawn from the facts found.

"In the solution of the problem here presented, no general or comprehensive definition of 'obsolescence' is necessary. The word is much used and its meaning depends upon and varies with the connections in which it is employed. *It has been said to be 'the condition or process by which units gradually cease to be useful or profitable as a part of the property, on account of changed conditions.'* Obsolescence is not necessarily confined to particular elements or parts of a plant; the whole may become obsolete. *Obsolescence may arise as the result of laws regulating or forbidding the particular use of the property as well as from changes in the art, the shifting of business centers, loss of trade, inadequacy or other causes.*

"We are here concerned with the meaning of obsolescence as used in the above quoted clause of the taxing Act. *Clearly the statute contemplates that, where warranted by the facts, the taxpayer shall have the benefit of, and in making his return may deduct in each year, a reasonable allowance to cover obsolescence of the tangible property. And that is in accord with sound principles of accounting. Cf. Kansas City So. Ry.* v. *United States,* 231 U. S. 423, 451. *Pacific Gas Co.* v. *San Francisco,* 265 U. S. 403, 415. The provision is general and applied alike to all taxpayers; its purpose is to guide the ascertainment of taxable

income in each year. *It is a familiar rule that tax laws are to be liberally construed in favor of taxpayers. Farmers Loan & T. Co.* v. *Minnesota*, 280 U. S. 204, 212. *Bowers* v. *N. Y. & Albany Co.*, 273 U. S. 346, 350. *United States* v. *Merriam*, 263 U. S. 179, 188. *Shwab* v. *Doyle*, 258 U. S. 529, 536. *Eidman* v. *Martinez*, 184 U. S. 578, 583.

"It would be unreasonable and violate that canon of construction to put upon the taxpayer the burden of proving to a reasonable certainty the existence and amount of obsolescence. Such weight of evidence as would reasonably support a verdict for a plaintiff in an ordinary action for the recovery of money fairly may be deemed sufficient. Neither the cost of obsolescence nor of accruing exhaustion, wear and tear that is properly chargeable in any period of time can be measured accurately. A reasonable approximation of the amount that fairly may be included in the accounts of any year is all that is required. In determining the proper deduction for obsolescence there is to be taken into consideration the amount probably recoverable, at the end of its service, by putting the property to another use or by selling it as scrap or otherwise. There is no hard and fast rule, as suggested by the Government, that a taxpayer must show that his property will be scrapped or cease to be used or useful for any purpose, before any allowance may be made for obsolescence." (Italics ours.)

This case was followed in *United States* v. *Wagner Electric Mfg. Co.*, 61 Fed. (2nd) 204, (C. C. A. 8th, 1932), in an opinion by Judge Sanborn, wherein he quoted from the *Niagara Falls Brewing Co.* case and then said (page 207):

"All that the court, in this case, was required to do, then, was to make a reasonable approximation of the portion of the admitted loss from obsolescence which

took place in the year 1918, when the event transpired which caused the entire loss."

The Wagner Electric Company had been making shells first for the British and later for the United States for use in the World War. After the signing of the Armistice it received notice to suspend further operations of this character. A claim for obsolescence on the plant and machinery especially adapted for shell-making followed. Referring to the case of *United States Cartridge Co.* v. *United States*, 284 U. S. 511 (1932), Judge Sanborn said (page 206):

> "The court pointed out that "'obsolescence' may arise from changes in the art, shifting of business centers, loss of trade, inadequacy, supersession, prohibitory laws, and other things which, apart from physical deterioration, operate to cause plant elements or the plant as a whole to suffer diminution in value," and then said (page 517 of 284 U. S., 52 S. Ct. 243, 245): "Under the circumstances disclosed by the findings, the buildings erected by petitioner are not to be distinguished from equipment designed, constructed and suitable only for the performance of a single job or from brewery plants put out of use by prohibitory laws."

It is interesting to note that Judge Sanborn did not think it material whether obsolescence for all the machinery and equipment used in the manufacture of shells was taken in the year 1918 when the Armistice was declared, or partly in 1918 and partly in the year following. All that he considered necessary was "a reasonable approximation."

Judge Sanborn did, however, point out very clearly that since the event which caused obsolescence to set in, namely the signing of the Armistice on November 11th, occurred during the year 1918, the full amount of loss due

to obsolescence might be taken in that year. In his opinion Judge Sanborn stated (p. 206):

"The end of the war on November 11, 1918, marked the end of the usefulness of special plants and machinery for the making of munitions to be used in the prosecution of the war. The value of such plants and machinery due to the continuation of hostilities disappeared when the hostilities ceased, and there remained then only such value as the property might have for other uses or for salvage. As the loss from obsolescence to this taxpayer was admitted, there remained to be determined only the question as to what proportion of such loss could properly be attributed to the year 1918. *Since the event which caused the loss occurred in 1918, it would appear that the entire loss might not unreasonably have been attributed to that year.* The fact that the taxpayer could still use a portion of the machinery for one month in 1919 to finish shells in process of manufacture was a matter to be considered in determining its income for 1918, but obviously it did not postpone the effect of the Armistice upon the value of the taxpayer's tangible property or prevent the depreciation of that property resulting from that event. Being valuable only in time of war, the property took the full depreciation due to the cessation of war at once. We think that in this case it is not important what value the taxpayer's property had for use in finishing work in process, since the full amount of loss due to obsolescence is not in dispute and since the use was merely incidental to the winding up of the taxpayer's business of manufacturing munitions. The Board of Tax Appeals apparently reached a similar conclusion in Plymouth Brewing & Malting Co. *v.* Commissioner, 16 B. T. A. 123, and in J. Chr. G. Hupfel Co., Inc., *v.* Commissioner, 9 B. T. A. 944." (Italics ours.)

It is apparent from the above case that obsolescence is not a process which must go on over a period of years, but that on the contrary, a tangible asset may become obsolete over night.

2. The loss sustained by taxpayer through obsolescence and abandonment of the title plant formerly owned by the Land Title and Trust Company, is the difference between the fair market value of the said title plant on March 1, 1913, and the value thereof on October 31, 1928.

Section 114 (a) of the Revenue Act of 1928 expressly sets forth the basis upon which obsolescence is to be allowed and is as follows:

> "SEC. 114. **Basis for Depreciation and Depletion**
> (a) **Basis for Depreciation.** The basis upon which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the same as is provided in section 113 for the purpose of determining the gain or loss upon the sale or other disposition of such property."

Section 113 of the Revenue Act of 1928 referred to in the above quoted section is in part as follows:

> "§113. **Basis for Determining Gain or Loss (a) Property Acquired After February 28, 1913.** The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—
>
> * * * * * * *
>
> **(7) Transfers to corporation where control of property remains in same persons.** If the property was acquired after December 31, 1917, by a corporation in connection with a reorganization, and immediately after the transfer an interest or control in such prop-

erty of 80 per centum or more remained in the same persons or any of them, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made."

The stipulation in the case at bar sets forth that all of the stock of the new corporation, *i. e.*, The Real Estate-Land Title and Trust Company, was issued to the stockholders of the three corporations forming the merger in consideration for the assets of these corporations acquired by the new company. The said stipulation also sets forth that the said merger was a transaction in which no gain or loss to any of the merging companies was recognized for purposes of Federal income tax under the provisions of the Revenue Act properly applicable thereto (R. 245-247). Therefore under the provisions of Section 113 (a) (7) of the Revenue Act of 1928 quoted above, the basis upon which obsolescence is to be allowed to the taxpayer herein in connection with the said title plant formerly owned by the Land Title and Trust Company is the "same as it would be in the hands of the transferor", which transferor was the said Land Title and Trust Company.

The recent case of *Fairbanks Court Wholesale Grocery Co.* v. *Commissioner of Internal Revenue*, 84 Fed. (2nd) 18, (C. C. A. 7th, 1936; *certiorari* denied 299 U. S. 582), decides on facts similar to those in the case at bar that the basis on which obsolescence is allowable to the new corporation is the same as the basis in the hands of the merging corporation which previously owned the property. In the present case this basis is the March 1, 1913 value, inasmuch as the said title plant was acquired by the Land Title and Trust Company prior to March 1, 1913, and the taxpayer is therefore permitted by Section 113 (b) of the Revenue Act of 1928 (Appendix to this brief, page 51)

to use the cost of the said title plant or its March 1, 1913 value, whichever is greater.

The Trial Judge found that the title plant in question was acquired by the Land Title and Trust Company during the years 1886 and 1887 at a cost of $251,509.84. He also found that additions to the said plant were made in the years 1888, 1889 and 1890 at a cost of $24,541.78, and that from 1890 to February 28, 1913 at least $317,645.36 was expended in maintaining the said title plant and keeping it up-to-date, which materially increased the value of the said plant (R. 294, 295). The evidence introduced by the taxpayer at the trial of this case showed that the title plant had a value of from $1,000,000 to $1,250,000 on March 1, 1913, and the Trial Judge found that on March 1, 1913 the fair market value of the said title plant was $1,000,000 (R. 297). From the above it is clear that the value of the said title plant on March 1, 1913 was greater than its cost and therefore, under the provisions of Section 113 (b) of the Revenue Act of 1928, the March 1, 1913 value or $1,000,000, is the basis on which obsolescence is allowable in this case.

The taxpayer's fiscal year was November 1 to October 31. The loss occurred between November 1, 1927 and October 31, 1928. The amount of the loss is therefore to be ascertained by deducting the value of the said title plant on October 31, 1928 from its value on March 1, 1913. The testimony of taxpayer's witnesses showed that on October 31, 1928 the value of the said title plant had diminished through obsolescence to an amount not in excess of $125,000 (R. 76, 102). As above stated the Trial Judge found that the fair market value of the title plant on March 1, 1913 was $1,000,000. The Trial Judge also found that on October 31, 1928, the fair market value of this title plant was $125,000, and that the taxpayer had sustained a loss during the taxable year ending October 31, 1928 in the amount of $875,000 representing the difference between these values (R. 298).

3. There is ample evidence to sustain the Findings of Fact of the Trial Judge.

The learned Trial Judge filed, *inter alia*, the following Findings of Fact:

(*a*) The title plant formerly owned by the Land Title and Trust Company was used in the business of the plaintiff-petitioner after the merger in November 1927 (Finding No. 15, R. 296).

(*b*) Upon investigation it was learned that the Real Estate Title Insurance and Trust Company's title plant was being operated by 43 employees while 124 employees were required to operate the title plant of the Land Title and Trust Company (Finding No. 18, R. 296).

(*c*) After said investigation it was determined that plaintiff-petitioner would try out the title plant of the Real Estate Title Insurance and Trust Company upon commencement of business after the merger, and that the title plant of the Land Title and Trust Company would be stored and held in reserve (Finding No. 19, R. 296).

(*d*) The said title plant formerly owned by the Land Title and Trust Company was moved to the basement of premises No. 517 Chestnut Street, Philadelphia, Pa., and stored there during the latter part of October and early part of November, 1927 (Finding No. 20, R. 296).

(*e*) No entries were made in the title plant formerly owned by the Land Title and Trust Company after the latter part of October, 1927. To keep the plant up-to-date, it would have been necessary to make a total of 227,498 entries for the plaintiff's fiscal year beginning November 1, 1927, and ending October 31, 1928 (Finding No. 16, R. 296).

(*f*) About two months after the merger, it was decided that the title plant formerly owned by the Real Estate Title Insurance and Trust Company was adequate for the purposes of the plaintiff-petitioner and that the title plant formerly owned by the Land Title and Trust Company,

which had been put in storage, would not be needed (Finding No. 21, R. 296, 297).

In support of the above Findings we respectfully refer to the testimony of J. Willison Smith, President of the taxpayer corporation, wherein the following appears (R. 32, 33, 34):

> "Mr. Bonsall was requested to take up the subject and make a report, which he did, in the latter part of October, toward the end of October, 1927. I don't recall definitely who worked with Mr. Bonsall, but I think Mr. Mecutchen, who was the title officer, worked with Mr. Bonsall on that report, and they studied the situation with the Real Estate Title officers (Tr. 21-22). The report was that from the practical standpoint, and an economical standpoint, the Real Estate Title plant should be tested out and determine whether the economy would make it worth while to continue that plant and not use—until that trial period was over—anything in the way of the Land Title plant. The Land Title plant had to be used for a very short time in part on account of the time element with respect to Sheriff's sales of the coming month, the month of November, and I think December, although I can't say definitely on that. Economy of operation of the Real Estate Title plant was so convincing that it was definitely determined later that the plant of the Real Estate Title should be the working plant. The plant of the Land Title had been placed in the basement of 517 Chestnut Street, which was the old office of the Real Estate Title Insurance and Trust Company, and now the downtown office of the Land Title Bank and Trust Company.
>
> "We did not keep the Land Title plant up-to-date. It was allowed to run down, as far as keeping it up to the daily records, and judgments and plans and abstracts from the daily records, and so forth (Tr. 23).

"Q. At what time did you start to allow the Land Title plant to go down?

"A. Well, my recollection was about the time of the latter part of October, about that time. But parts of the Land Title plant were used during the early part of November, as I recall it, of 1927, to take care of some situations which were necessary at that particular time of the month.

"Q. In other words, I understood that you testified that they continued to use it, but did they continue to keep up the records in it?

"A. No, they did not.

"Q. From sometime, you say, in the latter part of October?

"A. That is correct" (R. 32, 33).

* * * * * * *

"Q. What was the ultimate disposition of that plant?

"A. It is still there without use, without practically any use.

"Q. When did you cease to use it?

"A. I don't believe that plant has been used—of course I did not actually physically handle the situation, but to the best of my recollection it hasn't been used since 1928, early part of 1928" (R. 34).

The testimony of Mr. Mecutchen is in part as follows (R. 50-52; 57):

"Q. Mr. Smith testified that Mr. Bonsall and Mr. Cowdrick took up the question of which of the two title plants would be used by the new company. Were you associated with Mr. Bonsall in that work?

"A. I went around with him and Mr. Cowdrick. We were shown the various operations that went on in the Real Estate Title plant and the character of its conditions; Mr. Cowdrick asking some questions that were asked by us, particularly by Mr.

Bonsall. And it was after that it was concluded to try out the Real Estate Title plant as being the preferable one to use from the standpoint of economy and probably also from the standpoint of speed" (R. 50).

• • • • • • • •

"Q. Then I understand you came to the conclusion to use the Real Estate Title plant on account of economy of operation?

"A. Yes, sir; that is true.

"Q. And what happened to the Land Title plant?

"A. The Land Title plant was taken down to 517 Chestnut Street, and the larger part of it was stored in the basement, some portions of it were kept elsewhere. I think the block plan books were not stored in the basement, but everything else of any importance, that I know of, was stored down there" (R. 51, 52).

• • • • • • • •

"Q. And what happened to them after they were put there? Were they used or not?

"A. The only use made of them in October, that I know of, was that the block plan books, which were sent down first, were used as a means of ascertaining what insurances were involved in connection with the forthcoming Sheriff sales of November, it having been the custom to look at such insurances to make sure that the Sheriff sales were not upon any liens which affected the title as of the date that we had insurance—to any such properties. And outside of that I have no personal knowledge of what reference may have been made, from time to time, after the first of November, when the new company went into operation, what references may have been made from time to time to that plant (Tr. 66).

"Q. You do know that they looked up some things from time to time?

"A. But I believe, from time to time, there has been, very occasionally, a check-up of some information from material in the plant to save a visit to City Hall.

"Q. Did they increase or decrease after the plant was stored there?

"A. I think that it decreased as the time went by, so that there was practically little or no use made of it by the end of the year following the merger" (R. 57).

Mr. Mecutchen testified that the number of entries which would have been made in the title plant of the Land Title and Trust Company for the year beginning November 1, 1927 and ending October 31, 1928, had the said title plant been kept up-to-date during that period, would have totaled 227,498 as follows (R. 105):

"From November 1st, 1927 to October 31, 1928, inclusive, there were 54,419 mortgages; 62,710 deeds, 19,963 assignments; 2,031 releases; 38,207 judgments; 47,075 liens, including more particularly mechanics and municipal claims; and United States District Court judgments, 1,944; and bankruptcies, 1,149."

The learned Trial Judge also found as follows:

(*g*) The said title plant formerly owned by the Land Title and Trust Company was the subject of obsolescence during the plaintiff's fiscal year commencing November 1, 1927, and ending October 31, 1928, and became obsolete on or before October 31, 1928 (Finding No. 24, R. 297).

The above finding is supported by the following testimony of Henry R. Robins, President of the Commonwealth Title Company of Philadelphia (R. 77, 78 and 96):

"Q. Let me ask you to say what the difference was in the plant after it had been taken out of use in October, 1927, and stored in the basement, 517 Chestnut Street—what would the difference be in the plant by October 31, 1928? (Tr. 105.)

"THE WITNESS:—It would have a continuous depreciation from October 31, 1927, down to 1928; that depreciation rapidly increasing as time went on. In the early part of 1928 the depreciation of the value of that plant would not be so great as at the end of the year, and as you got near the end of the year it would go down at a greater rate. So it would be pretty nearly valueless at the end of the year, for the expense of bringing it up to date would have been so great that no one would have thought—no sane man in business would have thought of buying that plant and going to the expense of bringing it up to date.

"By MR. EWING:

"Q. That is a year after it had been stored?

"A. A year after it had been stored. In the early part of the year the expense of bringing it up to date would not have been so great.

"Q. What other elements do you take at fixing the value as of October 31, 1928, beside the cost of bringing the plant up to date?

"A. The question of marketability.

"Q. How would that be affected?

"A. Why, greatly. Any asset of any kind which is discarded, allowed to deteriorate, and then attempted to be sold as a second-hand used article, depreciates in value; and the title plant does, in the same way, the same as the ordinary" (R. 77, 78).

• • • • • • •

"Q. Well now, what effect, as far as the value of the plant is concerned, taking it out of use and storing it down in the basement, would it have on the plant?

"A. It would deteriorate most rapidly (Tr. 135, 136).

"Q. You testified it would deteriorate from not being kept up. Would that have any other effect on possible purchasers of the plant?

"A. It certainly would. Possibly a purchaser of anything in the way of a second-hand article is going to figure, as Mr. Mecutchen brought out, what it is going to cost to bring it up. It is a second-hand article. He can go and buy a cheaper new article of a modern make that will answer his purpose just as well, and he is not going to buy a second-hand article that he has got to spend money on, if he can buy something else that answers his purpose, cheaper, and is not anything as good.

"Q. And was it known the reason this was discarded for The Real Estate-Land Title plant was on account of its high cost of operation?

"A. Yes. Throughout all title circles of Philadelphia where there was a possible market for this plant everyone knew that the Land Title's plant had been discarded and the Real Estate Title plant was the one that was going to be used.

"Q. And they knew the reason for it?

"A. Every title company in town knew it, and every company in town knew the reason why, on account of the expensive mode of operation. It was discussed at title meetings; representatives of title companies talked it over" (R. 96).

The learned Trial Judge also found as follows:

(*h*) The plaintiff-petitioner sustained a loss during its fiscal year commencing November 1, 1927, and ending October 31, 1928, in an amount equal to the difference between the fair market value on March 1, 1913, of the title plant formerly owned by the Land Title and Trust Company and the fair market value of the said title

plant on October 31, 1928. The plaintiff-petitioner sustained a loss in said taxable year in an amount of not less than $875,000 (testimony of Mecutchen, *supra*) (Finding No. 27, R. 298).

In Mr. Mecutchen's testimony we find the following (R. 102).

"Q. You were familiar, of course, in your testimony yesterday, with the plant of the Land Title and Trust Company, where you were working on March 1st, 1913?

"A. Yes (Tr. 147).

"Q. What, in your opinion, was the fair value of that title plant at that time?

"A. I think it was worth, in my opinion, a million dollars.

"Q. And you were equally familiar with the plant on October 31, 1928, a year after the merger? What in your opinion—your answer to that is yes?

"A. Yes, that is true.

"Q. What, in your opinion, was the fair value of the plant at that time?

"A. Not over a hundred to $125,000."

In this connection Mr. Robins testified as follows (R. 74, 75 and 76):

"Q. What, in your opinion, was the fair value of the plant of that title plant on March 1st, 1913?

"THE WITNESS:—March 1st, 1913, I would say I am of the opinion that the title plant of the Land Title and Trust Company was worth one million and a quarter dollars" (R. 74, 75).

* * * * * * *

"Q. I am asking you now, under the conditions which you heard testified to yesterday by Mr. Mecutchen, what, in your opinion, was the fair value of that plant as it was a year after the merger in October 31, 1928?

"A. It was worth just about what you could get for it. I would not believe you could have gotten over $100,000 at the outside.

"Q. Then, in your opinion, the outside fair value of the plant on October 31, 1928, would be $100,000?

"A. About $100,000. Somewhere between fifty and a hundred. You couldn't find a purchaser for that" (R. 76).

The above Findings of the Trial Judge were filed after J. Willison Smith, President of the taxpayer corporation, Peirce Mecutchen, Title Officer of the taxpayer corporation, and Henry R. Robins, President of the Commonwealth Title Company of Philadelphia, had testified in open court. These men are respected citizens of the community of many years experience in the title business, and were qualified to testify on matters of this character as well as, if not better than, anyone else. They were all cross-examined by counsel for the Government and were questioned by the Trial Judge, after which the above Findings were filed. It is submitted that the Trial Judge could have had no better evidence on which to base his Findings of Fact in this case, and the foregoing quotations from the record clearly prove that there was ample testimony to support his Findings.

4. The Circuit Court of Appeals erred in directing the entry of a judgment contrary to the Findings of Fact and Conclusions of Law of the Trial Judge, in that his Findings of Fact are conclusive and fully sustain his Conclusions of Law.

This proceeding was instituted under the Tucker Act, which in Section 7 thereof (28 U. S. C. A. Section 764) provides as follows:

"It shall be the duty of the court to cause a written opinion to be filed in the cause, setting forth the specific findings by the court of the facts therein and

the conclusions of the court upon all questions of law involved in the case, and to render judgment thereon."

The Findings of Fact, Conclusions of Law, and the Opinion of the Trial Judge are set forth at length on pages 287 to 306 inclusive of the Record.

It is clear from the testimony quoted under the preceding heading that there is ample evidence to support the Findings of the Trial Judge, *and since this is so, the Findings of the Trial Judge are conclusive.* The only question then is whether or not the Conclusions of Law of the Trial Judge are supported by his Findings of Fact.

In *United States* v. *Buffalo Pitts Company*, 234 U. S. 228 (1914), a proceeding instituted under the Tucker Act in which this question arose, Mr. Justice Day in his opinion stated, at p. 232:

> "In cases brought under this act coming up from a District or Circuit Court of the United States *the findings of fact of the trial court are conclusive*, and the question is whether the conclusions of law were warranted by the facts found (*Chase* v. *United States*, 155 U. S. 489, 500). Exceptions to the rule may exist if the record enables the court to conclude that the ultimate facts found are not supported by *any evidence whatever (Collier* v. *United States*, 173 U. S. 79)." (Italics ours.)

From the above quotation from the opinion of Mr. Justice Day it is clear that if the facts found by the Trial Judge in the court below are supported "by any evidence whatever," his findings are conclusive, and therefore, the only question for this Court is whether the Conclusions of Law and judgment originally entered in the District Court are supported by the facts found by the Trial Judge.

In *Chase* v. *The United States*, 155 U. S. 489 (1894), Mr. Justice Harlan stated in his opinion, at page 500:

> "But under that Act [the Tucker Act] a judgment of a District or Circuit Court of the United States in an action at law brought against the Government, will be re-examined here only when the record contains a specific finding of facts with the conclusions of law thereon. In such cases, this Court will only inquire whether the judgment below is supported by the facts thus found."

See also *Wessel, et al.* v. *United States*, 49 Fed. (2d) 137 (C. C. A. 8th, 1931), and *United States* v. *Union Trust Co. of Indianapolis, et al.*, 90 Fed. (2d) 702 (C. C. A. 7th, 1937), both of which arose under the Tucker Act and involved claims for refund of tax.

In the *Wessel* case Judge Kenyon in his opinion states (p. 139):

> "The special findings of fact by the trial court have the same effect as the verdict of a jury. Cramp *v.* United States, 239 U. S. 221, 36 S. Ct. 70, 60 L. Ed. 238; Crocker *v.* United States, 240 U. S. 74, 36 S. Ct. 245, 60 L. Ed. 533; Brothers *v.* United States, 250 U. S. 88, 39 S. Ct. 426, 63 L. Ed. 859; Stone *v.* United States, 164 U. S. 380, 17 S. Ct. 71, 41 L. Ed. 477."

In the *Union Trust Company* case Judge Major in his opinion states (p. 703):

> "It is not the province of this court to weigh the evidence or analyze the same except to the extent of ascertaining if the ultimate fact found by the trial court is supported by *any* evidence." (Italics ours.)

And again (p. 703):

> "While there is evidence in the record inconsistent with such ultimate finding by the trial court and evidence from which a contrary conclusion might be reached, yet there is evidence which supports it. The testimony of Mrs. Atwater with reference to the gift,

corroborated to some extent by Mrs. Roach, substantially justifies the finding of the trial court in the respect indicated."

In this connection attention is called to Rule 52 (a) of the new *Federal Rules of Civil Procedure* entitled, "Findings by the Court," which rule is in part as follows:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Section 23 of the Act of Congress approved May 29, 1928 (45 Stat. 795), known as the Revenue Act of 1928, provides in part as follows:

> §23. Deductions from Gross Income
>
> In computing net income there shall be allowed as deductions:
>
> • • • • • • •
>
> (f) **Losses by Corporations.** In the case of a corporation, losses sustained during the taxable year and not compensated for by insurance or otherwise.
>
> (g) **Basis for Determining Loss.** The basis for determining the amount of deduction for losses sustained, to be allowed under subsection (e) or (f), shall be the same as is provided in section 113 for determining the gain or loss from the sale or other disposition of property.
>
> • • • • • • •
>
> (k) **Depreciation.** A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. • • •

The provisions of the above quoted section of the Revenue Act of 1928 when applied to the Findings of

Fact set forth under the preceding heading of this brief, clearly support the following Conclusions of Law made by the learned Trial Judge:

> "6. The plaintiff-petitioner is entitled to deduct from its net taxable income, as determined by the Commissioner of Internal Revenue, for its fiscal year commencing November 1, 1927 and ending October 31, 1928 the loss sustained by it during said taxable year due to the abandonment of the title plant formerly owned by the Land Title and Trust Company" (R. 300).
>
> "7. The plaintiff-petitioner is entitled to deduct from its net taxable income, as determined by the Commissioner of Internal Revenue, for its fiscal year commencing November 1, 1927 and ending October 31, 1928 a reasonable allowance for obsolescence to the title plant formerly owned by the Land Title and Trust Company" (R. 300).
>
> "8. The plaintiff-petitioner is entitled to deduct from its net taxable income, as determined by the Commissioner of Internal Revenue, for its fiscal year commencing November 1, 1927 and ending October 31, 1928 the difference between the fair market value on March 1, 1913 of the title plant formerly owned by the Land Title and Trust Company and its fair market value on October 31, 1928" (R. 300).
>
> "9. The plaintiff-petitioner is entitled to deduct from its net taxable income, as determined by the Commissioner of Internal Revenue, for its fiscal year commencing November 1, 1927 and ending October 31, 1928 an amount not less than $875,000" (R. 301).

His Honor, Judge Biggs, in the Circuit Court of Appeals in the instant case said, *inter alia:*

> "To hold that the plant became obsolete within the taxable year is contrary to the facts. True, it was

not as useful at the end of the taxable year as at its beginning, but to conclude that a title plant created between the year 1886 and 1887, steadily added to and kept up to date until October, 1927, loses its usefulness in the following twelve months because of a failure to add current notations to its records is contrary to reason. There is no adequate evidence of record in the case at bar to sustain such a view" (R. 325).

It is submitted that the above holding of Judge Biggs is contrary to the Findings of Fact and Conclusions of Law of the learned Trial Judge, and since there is ample evidence to sustain the findings of the Trial Judge, and his findings in turn support his Conclusions of Law and the judgment entered in the District Court, it was clearly error for the Circuit Court of Appeals to reverse this judgment which was based upon and supported by these findings and conclusions. It is therefore submitted that this Honorable Court should exercise its power of supervision and reverse the judgment of the Circuit Court of Appeals.

5. On the record in this case taxpayer is clearly entitled to a deduction on the theory of abandonment as well as on the theory of obsolescence.

There appears to be no question but that taxpayer may claim the deduction herein contended for on the theory of obsolescence. We submit that this deduction is properly allowable also on the theory of abandonment.

The Circuit Court of Appeals, however, appeared to be of the opinion that this deduction could not be allowed on the theory of abandonment, in view of the claim for refund filed by taxpayer in this case.

In his opinion, Judge Biggs states (R. 325, 326):

"In our opinion the circumstances of the case at bar indicate the abandonment of a capital asset by the appellee.

* * * * * * *

"It is not necessary for us to pass upon the question of whether or not the deduction here sought might be available to the appellee upon the theory of the abandonment of a capital asset. The appellee cannot claim the deduction upon such a ground because it appears that the claim for refund asserted by the appellee was asserted by it solely upon the ground of obsolescence."

It is respectfully submitted that the Circuit Court of Appeals was clearly in error in taking this view.

The purpose of requiring the filing of a claim for refund is to inform the Commissioner of the basis of the taxpayer's claim and to afford him an opportunity of correcting errors made by his office.

On this point Mr. Justice Stone in his opinion in *Tucker* v. *Alexander*, 275 U. S. 228 (1927), states (page 231):

"The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial."

In *Wunderle* v. *McCaughn*, 38 Fed. (2d) 258 (D. C. E. D. Pa., 1929), Judge Kirkpatrick in his opinion states (page 260):

"The requirement of the statute (26 U. S. C. A. sec. 156) is 'a claim for refund or credit * * * according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof. * * *' The regulations in force require that 'all the facts relied upon

in support of the claim shall be clearly set forth under oath.' In Tucker *v.* Alexander, 275 U. S. 228, 48 S. Ct. 45, 72 L. Ed. 253, the Supreme Court said: 'The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial.' In the opinion of the lower court in the same case (reversed upon the question of waiver, but not disapproved upon the point here involved) it was pointed out that the principal purpose of the condition was to afford the Commissioner an opportunity to correct errors made by his office."

In the case at bar we respectfully refer the Court to the communication from the Deputy Commissioner of Internal Revenue dated February 11, 1931, advising taxpayer that its claim for refund would be rejected, in which communication the Deputy Commissioner states (R. 13):

> "Your claim is based on the statement that the title plant formerly owned by the Land Title and Trust Company became obsolete *and was abandoned;*" (Italics ours).

The above quotation clearly shows that the question of *abandonment* was submitted to the Commissioner of Internal Revenue by taxpayer in support of its claim.

In *Warner* v. *Walsh*, 24 Fed. (2d) 449 (D. C. Conn., 1927) the claim for refund was filed on the theory that the amount received by the taxpayer from the estate of her deceased husband was a bequest or a legacy, and therefore not subject to income tax. The court held the income not subject to tax on the theory that the widow by giving up her statutory rights in the estate was purchasing an annuity. The question was raised that this theory had

not been advanced in the claim for refund, and on this point Judge Thomas in his opinion states (p. 450):

> "The second ground is that, in the claim presented to the Commissioner of Internal Revenue for a refund, 'the alleged purchase for value theory' was not set out as a ground for such refund. I regard the claim as untenable. In Union & New Haven Trust Co. *v.* Eaton, Collector, 20 F. (2d) 419, decided by this court on June 2, 1927, it was held that a plaintiff, suing for a refund, is not barred from setting up a ground for relief which was not specified in his claim for refund. There this court said: 'To hold, therefore, that a plaintiff is precluded from asserting a reason * * * not advanced in his notice of claim, is to read a condition into the statute not legislated by Congress.'
>
> "Assuming, however, that the facts upon which a claim for refund is predicated must be incorporated in the notice of claim, and assuming that the plaintiff is precluded from setting up any further facts in her complaint, I cannot find that the notice of claim filed in the case at bar is deficient. The Commissioner is therein apprized of all of the material facts. It is true that the *theory* of the relief is not set out. But the theory of a claim for relief is something separate and apart from the facts, and the same set of facts may, and often does, give rise to differing theories. To say that an argument may not be advanced in this court which was not elaborated in the notice of claim before the Commissioner is unwarranted by the language and intent of the statute under consideration."

In *Warner* v. *Walsh*, 27 Fed. (2d) 952 (D. C. Conn., 1928), on this same point Judge Burrows in his opinion states (page 953):

"The defendant's second claim is that the taxpayer never presented in writing to the Commissioner of Internal Revenue the 'alleged purchase for value theory' as a ground for her claim for refund, and therefore the claim for refund was never properly presented, or considered within the meaning of the statutes, and hence this action will not lie. This claim was made to the court in the previous case of Warner *v.* Walsh (D. C.) 24 F. (2d) 449, and in the case of Union & New Haven Trust Co. *v.* Eaton, Collector (D. C.) 20 F. (2d) 419, and in both cases, Judge Thomas held this claim untenable, and I concur in this view."

In *Wunderle* v. *McCaughn, supra,* Judge Kirkpatrick, of the same court in which the case at bar was tried, said in his opinion at page 260:

"I am of the opinion that where, as in this case, the deduction of a specific item of credit claimed but subsequently disallowed by the Commissioner is the basis of the claim, a claim for refund, setting forth fully and in detail all the facts and circumstances giving rise to the claim, is a sufficient compliance with the statute, and, further, that the fact that an erroneous legal theory is presented, or, more specifically, that the deduction is claimed as a bad debt when it is really something else, does not destroy the legal sufficiency of the claim for refund.

* * * * * * *

"I am in accord with the view expressed in Warner *v.* Walsh (D. C.) 24 F. (2d) 449, and the opinion of Union & New Haven Trust Co. *v.* Eaton (D. C.) 20 F. (2d) 419, that, where the Commissioner is apprised of all the material facts, it is immaterial that the theory on which relief is asked is not set out. Nor, I think, is it material that the wrong theory is set

out. That is particularly true in a case like this in which the claim involves a narrow and sharply defined issue."

In *Union Trust Company of Pittsburgh* v. *McCaughn*, 24 Fed. (2d) 459 (D. C. E. D. Pa., 1927), the defendant demurred, alleging, *inter alia*, that the statement of claim was insufficient in that it did not exhibit the claim for refund which it alleged was filed and rejected, and did not allege or set forth that the ground upon which the action was based was presented to the Commissioner in the said claim. On this question Judge Kirkpatrick in his opinion stated (p. 460):

"*No copy of the claim for refund is attached to the statement.* The statement of claim does allege that 'plaintiff duly filed with defendant claim for refund in the sum of $11,854.79.' and that the claim was rejected, and at the argument a motion to amend the statement by attaching a copy was made and the amendment allowed. *An inspection of the paper shows that it does not include the claim now made.* However, a copy of the notice of rejection from the Commissioner of Internal Revenue is attached to the statement, which contains the following:

"'Mortgages, Notes, Cash, and Insurance.'	Returned.	Determined.	Adjusted.
Equitable Life Assurance Society policy	$101,000	$101,000	$101,000

"'It is contended by the estate that the ruling of the bureau in including in the deceedent's gross estate all of the above insurance is erroneous. A further review has been made by this office in connection with the above protest, careful consideration being given to the brief submitted by the estate on the question involved. The bureau is, however, unable to change

its former ruling, arrived at as the result of the conference held in this office, and therefore the determination, as shown in the closing letter, will be adhered to. *Your claim in connection with this question is, therefore, rejected.*'" (Italics ours.)

After quoting from the notice from the Commissioner of Internal Revenue, rejecting taxpayer's claim in the *Union Trust Co.* case as above set forth, Judge Kirkpatrick in his opinion continues (pages 460, 461):

"From this it appears that the matter of the inclusion of the life insurance policy in the decedent's gross estate, which is the basis of this suit, was presented to the Commissioner, and that it was considered and rejected by him. As stated in the opinion in Tucker *v.* Alexander, *supra:* 'The evident purposes and objects of this condition are to afford the Commissioner an opportunity to correct errors made by his office and to spare the parties and the courts the burden of litigation in respect thereto.'

"(3) *If these objects have been attained, the statute has been sufficiently complied with, even though some of the grounds upon which the claim was made were not specifically set forth in the application. It is apparent from the letter of the Commissioner that he had before him the question now raised, and that he had full opportunity to reconsider and modify the ruling of his office, had he deemed the ruling erroneous. He also, of course, had the right to waive any defect or informality in the application for refund, and, in view of his letter, he will be held to have done so.* I am therefore of the opinion that, so far as this requirement of the statute is concerned, the statement sets out a sufficient cause of action." (Italics ours.)

The situation in the case at bar is analogous to that in the *Union Trust Co.* case, *supra,* in that in the case at

bar the letter from the Deputy Commissioner advising that taxpayer's claim would be rejected (R. 13) clearly shows that the Commissioner considered the question of abandonment.

Paragraph 22 of the petition filed in the District Court in this proceeding is as follows:

> "22. Petitioner avers that in determining its net income for the fiscal year ending October 31, 1928, it is entitled to a deduction in the amount of $1,250,000.00, due to the fact that the said title insurance plant formerly owned by the Land Title and Trust Company became obsolete and was abandoned during the said year" (R. 7).

In its answer the defendant denied that the plant had been abandoned, but did not question the right of the petitioner to a deduction on this theory if the Court should determine that the plant had been abandoned. Nor was this question raised by the Government at the trial of this case.

Therefore if the Court should be of the opinion that there is a variance between the grounds alleged in the claim for refund and the grounds alleged in the petition filed in the District Court, which we do not admit, it is submitted that the Government can waive any right it may have to raise this question, and it is also submitted that by not raising it either in its answer or in the District Court, the Government has waived this right.

In *Tucker* v. *Alexander*, 275 U. S. 228, *supra*, the taxpayer was the owner of shares of stock in a corporation which was dissolved and liquidated during the year 1920. A distribution of some portion of the corporation's assets had been made to stockholders in May of 1913. On the dissolution the Commissioner of Internal Revenue taxed as income the difference between the value of the

property received by taxpayer as a liquidating dividend, and the value of stock on March 1, 1913 less the value of the distribution made in May of 1913, which distribution was treated as a return of capital.

Taxpayer paid the tax under protest, and filed a claim for refund assigning as reasons for his claim (1) the Commissioner's erroneous computation of the March 1, 1913 value of the stock, and (2) the Commissioner's failure to deduct from the capital and surplus of the company at the date of liquidation the amount of certain outstanding debts which were assumed by the stockholders.

There was no explicit statement made in the claim for refund that the Commissioner had erred in decreasing the March 1, 1913 value by the value of the property distributed in May, 1913, nor was that point raised by the petition filed in the District Court, which in effect merely repeated the allegations of the claim for refund.

In the course of the trial taxpayer, without objection by the Government, abandoned the grounds of recovery stated in the petition and attacked only the action of the Commissioner in deducting from the March 1, 1913 value, the value of the distribution made in May of 1913. This was apparently a question as to whether the distribution of May, 1913 was a return of capital, or the distribution of a dividend. That issue alone was litigated. At the close of the trial counsel stipulated that if the court found the deduction to have been made erroneously, the taxpayer should have judgment in a sum named. The judgment entered against taxpayer in the District Court was affirmed by the Court of Appeals for the Eighth Circuit (15 Fed. (2d) 356) *in an opinion holding that a recovery on grounds different from those set up in the claim for refund was precluded by Section 3226 of the Revised Statutes, as amended.*

Mr. Justice Stone, of the Supreme Court of the United States, *in reversing the judgment and holding that the*

taxpayer was not precluded from recovering in that case, said (pages 230, 231):

"In our view of the case, the question considered by the circuit court of appeals was not properly before it, and it should have passed upon the merits. *During the entire course of the trial no question was raised as to the sufficiency of the claim for refund.* The only substantial issue litigated was the correctness of the Commissioner's deduction of the distribution of May, 1913. All other questions were taken out of the case by stipulation.

"If the Collector and counsel for the government had power to waive an objection to the sufficiency of the description of the claim filed, it was waived here, and we need not consider the precise extent of the requirements prescribed by statute and regulations, nor whether petitioner's claim for refund fell short of satisfying them. The Solicitor General does not urge that the government's possible objection could not be waived but submits the question for our decision.

"Literal compliance with statutory requirements that a claim of appeal be filed with the Commissioner before suit is brought for a tax refund may be insisted upon by the defendant, whether the Collector or the United States. *Kings County Savings Institution* v. *Blair,* 116 U. S. 200; *Maryland Casualty Co.* v. *United States,* 251 U. S. 342, 353; 354; *Nichols* v. *United States,* 7 Wall. 122, 130. But no case appears to have held that such objections as that urged here may not be dispensed with by stipulation in open court on the trial. The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial. Failure

to observe them does not necessarily preclude recovery." (Italics ours.)

See also *Union Trust Company of Pittsburgh* v. *McCaughn*, 24 Fed. (2d) 459 (D. C. E. D. Pa., 1927), *supra*.

There is no question but that taxpayer herein sustained a substantial loss, in that during the taxable year in question a title plant owned by taxpayer lost a very large part of its value, and it is clear therefore that taxpayer is entitled to a deduction for this loss whether it be considered that the loss was sustained through obsolescence or abandonment. In either event it is a loss in connection with a title plant, and from the record it is apparent that the Commissioner of Internal Revenue was thoroughly familiar with taxpayer's claim.

It is therefore respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed and the judgment originally entered by the District Court affirmed.

Respectfully submitted,

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APPENDIX.

STATUTES INVOLVED.

The law applicable to this case is the Act of Congress approved May 29, 1928 (45 Stat. 795) known as the Revenue Act of 1928. The pertinent provisions of this statute are as follows:

"Section 1. Application of Title

The provisions of this title shall apply only to the taxable year 1928 and succeeding taxable years.

§48. Definitions

When used in this title—'

(a) Taxable Year. 'Taxable year' means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under this Part. 'Taxable year' includes, in the case of a return made for a fractional part of a year under the provisions of this title or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made. The first taxable year, to be called the taxable year 1928, shall be the calendar year 1928 or any fiscal year ending during the calendar year 1928.

(b) Fiscal Year. 'Fiscal year' means an accounting period of twelve months ending on the last day of any month other than December.

§23. Deductions from Gross Income

In computing net income there shall be allowed as deductions:

* * * * * * *

(f) Losses by Corporations. In the case of a corporation, losses sustained during the taxable year and not compensated for by insurance or otherwise.

(g) Basis for Determining Loss. The basis for

determining the amount of deduction for losses sustained, to be allowed under subsection (e) or (f), shall be the same as is provided in section 113 for determining the gain or loss from the sale or other disposition of property.

* * * * * * *

(k) Depreciation. A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. * * *

* * * * * * * *

(m) Basis for Depreciation and Depletion. The basis upon which depletion, exhaustion, wear and tear and obsolescence are to be allowed in respect of any property shall be as provided in section 114.

§114. Basis for Depreciation and Depletion

(a) Basis for Depreciation. The basis upon which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the same as is provided in section 113 for the purpose of determining the gain or loss upon the sale or other disposition of such property.

§113. Basis for Determining Gain or Loss

(a) Property Acquired After February 28, 1913. The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * * * *

(7) Transfers to corporation where control of property remains in same persons. If the property was acquired after December 31, 1917, by a corporation in connection with a reorganization, and immediately after the transfer an interest or control in such prop-

erty of 80 per centum or more remained in the same persons or any of them, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made.

• • • • • • • •

(b) **Property Acquired before March 1, 1913.** The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913 shall be:

(1) the cost of such property (or, in the case of such property as is described in subsection (a) (1), (4), (5), or (12) of this section, the basis as therein provided), or

(2) the fair market value of such property as of March 1, 1913, whichever is greater. In determining the fair market value of stock in a corporation as of March 1, 1913, due regard shall be given to the fair market value of the assets of the corporation as of that date.

§112. **Recognition of Gain or Loss**

(b) (4) **Same—Gain of corporation.** No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization."

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